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No. 80-1396

In the

Supreme Court of the United States

October Term, 1980

Jeanne Brandon, et al., *Petitioners*

v.

The Board of Education of the Guilderland School District, et al., *Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Brief of the Center for Constitutional Studies of the University of Notre Dame Law School as Amicus Curiae in Support of the Granting of Certiorari

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INTEREST OF AMICUS CURIAE

The Center for Constitutional Studies was established in 1977 by the University of Notre Dame to serve as a research institute and to engage in selected litigation affecting the integrity and autonomy of independent institutions of higher education,[1] especially church-related colleges or universities.[2] In this capacity, this Center has come to acquire considerable experience with the interpretations by various federal officials of this Court's decisions concerning the Religion Clauses of the First Amendment. Like the judgment of the Court of Appeals in this case, these administrative judgments often go far beyond the holdings of this Court, and the amicus is in a position to suggest to this Court the impact that the decision of the Court of Appeals, if uncorrected by this Court, could have on religiously affiliated higher education. With the consent of the parties, this brief is filed to provide the Court with the views of amicus on the volatile issue of voluntary prayer in public schools, on the relationship between the two Religion Clauses of the First Amendment and between those clauses and other important values protected in the First Amendment, and on the historic purposes of the Religion Clause of the First Amendment.

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[1]The Advisory Board of the Center for Constitutional Studies is composed of attorneys, college administrators and executives of denominations and religious bodies engaged in education. The ecumenical composition of this Board is reflected in the fact that its members are drawn from the following religious groups or communities of faith: Church of Jesus Christ of Latter-Day Saints (Mormon), Jewish, Lutheran, Mennonite, Roman Catholic, Southern Baptist, United Methodist and United Presbyterian.

[2]See e.g., P. Moots and E. Gaffney, *Church and Campus: Legal Issues in Religiously Affiliated Higher Education (1979)*.

STATEMENT OF THE CASE

As the time of the commencement of this action the plaintiff-petitioners consisted of a group of six high school juniors (A5) who are currently of college age. At all times relevant to this lawsuit, the petitioners have sincerely believed that they should join together for daily communal prayer (A10-11, 24). Acting upon this religious conviction, they formed a voluntary association known as "Students for Voluntary Prayer" and sought permission from the defendant-respondents to use a room in their high school for the purpose of conducting communal prayer meeting before classes began; the meetings were to be held without any official school assistance, supervision, aid or participation (A8). Despite repeated assurances that these meetings were to be completely separate, distinct, and independent from all other school functions and activities, and that attendance at each meeting was entirely voluntary and at the sole discretion of interested individual students (A8), the principal of the high school, the superintendent of the school district, and the members of the school board all denied to "Students for Voluntary Prayer" permission to use any part of public school property for the purpose of joining together in speech or expression that has an explicitly religious content (A8-9). The reason proferred by the defendant-respondents for this action was that to allow any use of public school facilities for a religious purpose, such as the meetings contemplated by the petitioners, would constitute an establishment of religion in violation of the First and Fourteenth Amendments to the Constitution (A10). The only legal authority for this view appearing in the record before the commencement of this action is an opinion letter dated October 9, 1978, and signed

by Robert D. Stone, General Counsel of the Commission of Education of the State of New York, who, without citing any case authority, expressed the view that "The United States Supreme Court has prohibited scripture reading and the recitation of prayers in the public schools, as violative of the establishment clause of the First Amendment of the United States Constitution and the doctrine of separation of church and state." (A42) Acknowledging that "The Supreme Court has not decided a case directly on point with this one," 487 F.Supp. 1219, 1222 (N.D.N.Y. 1980) and that he "was not comfortable with the result in this case, which will preclude a group of sincere young people from gathering together for religious purposes," *id.* at 1233, District Judge Neal McCurn granted summary judgment for the defendant-respondents and dismissed the complaint of the plaintiff-petitioners in its entirety. The Court of Appeals, in an opinion reported at 635 F.2d 971, affirmed the judgment of the District Court on November 17, 1980. Petitioners filed their petition for certiorari in timely fashion.

ARGUMENT

I. GRANTING CERTIORARI IN THIS CASE WOULD AFFORD THIS COURT AN OPPORTUNITY TO CLARIFY ITS TEACHING CONCERNING THE PERMISSIBILITY OF GENUINELY VOLUNTARY PRAYER.

In his opinion for this Court in *Committee for Public Educational Religious Liberty v. Regan*, 444 U.S. 646, (1980) Justice White wrote that "Establishment Clause cases are not easy; they stir

deep feelings. . . ." *id.* at 662. This Court's decisions in *Engel v. Vitale*, 370 U.S. 421 (1962) and in *Abington School District v. Schempp*, 374 U.S. 203 (1963) have surely been among the cases that have stirred "deep feelings" in the Republic. The impact of these decisions on the American political process has been studied extensively.[3] Much of the initial furor over these two cases was based on a failure to read those decisions carefully, if at all.[4] As a legitimate exercise of its obligation to promote willing acceptance of its decrees by the people, this Court should seize the opportunity afforded it by the instant case to clarify its teaching adumbrated in *Engel* and *Schempp* concerning the permissibility of genuinely voluntary prayer in public buildings, including public school facilities.

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[3]See, e.g. Beaney and Beiser, "Prayer and Politics: The Impact of Engel and Schempp on the Political Process" 13 J. of Pub. L. 475 (1964) reprinted in T. Becker, ed. *The Impact of Supreme Court Decisions* 20-34 (1969). For other examples of impact studies relating to the *Engel* and *Schempp* decision, see Katz, "Patterns of Compliance with the *Schempp* Decision," 14 J. Pub. L. 396 (1963); Birkby, "The Supreme Court and the Bible: Tennessee Reactions to the *Schempp* Decision" 10 Midwest J. of Pol. Sci. 304 (Aug. 1966); R. Johnson, *The Dynamics of Complaince: Supreme Court Decision-Making From a New Perspective* (1967); Reich, "The Impact of Judicial Decision-Making: The School Prayer Cases," in D. Everson, ed., *The Supreme Court as Policy Maker: Three Studies on the Impact of Judicial Decisions* 44-81 (1968); W. Muir, *Prayer in the Public Schools: Law and Attitude Change* (1967); and K. Dolbeare and P. Hammond, *The School Prayer Decisions: From Court Policy to Local Practice* (1971).

[4]For an account of the congressional reaction, see Beaney and Beiser, note 3 *supra*. And see 125 Cong. Rec. S 4128-4131 (daily ed., Apr. 5, 1979) (purporting to limit Supreme Court jurisdiction over cases involving "voluntary prayer"), and S 4138-4152 (daily ed., Apr. 9, 1979) (same); Comment, "Section 1252: A Jurisdictional Dinosaur," 75 Northwestern U. L. Rev. 175, 176 (1980).

The opinion of the Court of Appeals in the instant case is an example of the damage that can be done to valuable constitutional rights if those charged with applying *Engel* and *Schempp* to a variety of factual patterns stray too far beyond the holdings of those cases. This is not to suggest that this Court should reverse the decisions announced in those cases. For this Court need not retreat from its holding in *Engel* that the states should refrain from composing prayers for public recitation in the public schools, or from its ruling in *Schempp* that the states should eschew even subtle forms of coerced participation in devotional exercises.

Many constitutional scholars have construed the real significance of this Court's ruling in *Zorach v. Clauson*, 343 U.S. 306 (1952) and *McCollum v. Bd. of Education*, 333 U.S. 203 (1948) as a unified prohibition of employing "the *force* of the public school . . . to promote [religious] instruction." *Zorach*, *supra* at 315 (emphasis added). See, e.g., Toms and Whitehead, "The Religious Student In Public Education: Resolving a Constitutional Dilemma," 27 Emory L. J. 3 (1978), and literature cited therein. There is no evidence of a "captive audience" in the case at bar. Professor Laurence Tribe suggests that the gist of the offense in *McCollum* was "the combination of material, organizational, and, above all, *symbolic* support for religious instruction," *American Constitutional Law* 825 (1978). No such support was sought by the plaintiff-petitioners in this case. Ardent opponents of school prayer amendments have testified before congressional committees that the crux of the issue is that the State cannot *promote* or *establish* the reading of the Bible or the recitation of prayers. For example, in April of 1964 the well known constitutional scholar, Dr. Leo Pfeffer, testified as follows:

> There is not one word in any decision of the Supreme Court including Murray, Engel, Zorach, or McCollum, or any State court decision which can, to any extent, be interpreted as forbidding children to pray or to read the Bible in the public schools. . . . All it says is that the State through its agencies cannot promote or establish the reading of the Bible or recitation of prayers.

Hearings on School Prayer before the Subcommittee on Constitutional Amendments of the Senate Judiciary Committee, 89th Cong., 2d Sess. 188 (1966). In the 1966 Senate hearings Dr. Pfeffer stated:

> Nothing in any decision of the Supreme Court forbids an individual schoolchild voluntarily to offer a prayer before or after taking of food or perhaps on other occasions, so long as the regular discipline of the school and other children is not thereby disturbed or interfered with.

Id. at 345-346. For similar statements, see *id.* at 215 (statement of Baptist Joint Committee on Public Affairs), at 263 (statement of Department of Social Responsibility, Unitarian Universalist Association), and at 307 (statement of Methodist Bishop Richard Raines). Since the record in the instant case discloses that none of the activity that the petitioners sought to engage in was to be sponsored or provided for by the public school administration, this case presents an opportunity for this Court to clarify that *truly* voluntary prayer is constitutionally permissible.

Such clarification is important not only for the ongoing relationship between this Court and other federal and state tribunals engaged in constitu-

tional adjudication. It would likewise be helpful for the myriad federal and state officials charged with executing a variety of programs of financial assistance. As was stated above, pg. 1, the work of the amicus is frequently focused on legal issues facing religiously affiliated colleges and universities, and in that way amicus has seen administrative interpretations of the constitution purporting to be grounded in this Court's decisions but ranging far beyond their holdings.

As part of a study of the impact of federal regulation on religiously affiliated colleges and universities, the Center for Constitutional Studies conducted an extensive survey of the chief administrators of these institutions in 1979.[5] One of the results of this study is that the college administrators participating in the study rarely complained of federal regulation as excessively burdensome. A notable exception to this finding was the frequent complaint that strained interpretations concerning the use of federally funded facilities for any sort of religious purpose constituted governmental interference. This study disclosed several instances of administrative hostility toward religion on campuses. By granting certiorari in this case, this Court could clarify for administrative officials that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz v. Tax Commission*, 397 U.S. 664, 669 (1970).

[5]The results of this study are to be published by the University of Notre Dame Press in the spring of 1981 under the title *The Government and the Campus: Federal Regulation of Religiously Affiliated Higher Education.* The page proofs of this study are available to the librarian of the Supreme Court, the parties in this litigation, and other amici upon request to the Center for Constitutional Studies.

II. GRANTING CERTIORARI IN THIS CASE WOULD ENABLE THIS COURT TO CLARIFY ITS TEACHING CONCERNING THE PRIMACY OF THE FREE EXERCISE CLAUSE IN CASES OF CONFLICT WITH THE NO-ESTABLISHMENT PRINCIPLE AND ITS TEACHING CONCERNING THE RELATIONSHIP BETWEEN THE RELIGION CLAUSES AND OTHER IMPORTANT VALUES PROTECTED BY THE FIRST AMENDMENT.

A. THE PRIMACY OF FREE EXERCISE OF RELIGION

This Court has ruled that the government may not burden legitimate claims of free exercise of religion unless it has a truly compelling justification for doing so, and unless it has done so in a manner that places the least restrictive burden upon the exercise of religious freedom. *Sherbert v. Verner*, 374 U.S. 398 (1963). The relationship between the free exercise interest protected in *Sherbert* and in cases similar to it, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and the no-establishment principle asserted in *Everson v. Bd. of Education*, 330 U.S. 1 (1947) and its progeny has never been clarified in a hard and fast ruling of this Court, but has been left to case by case adjudication. Analysis of the body of Church-State law that has developed since *Everson*, however, discloses that this Court has repeatedly affirmed that free exercise values are significant and need breathing space. This Court has never taught that legitimate free exercise claims may easily be defeated by engaging in a balancing of interests in which the no-establishment

principle would always be the dominant concern.

Some courts, including the Court of Appeals in the instant case, apparently assume that reasonable accommodations of religious beliefs and practices constitute an impermissible establishment of religion. See, e.g. *Brandon*, 635 F.2d 971, 978-79 (2d Cir. 1980); *Thomas v. Review Bd. of Indiana Employment Security Division*, 391 N.E. 2d 1127 (Ind. 1979), cert. granted, No. 79-952, 444 U.S. 1070 (1980). But to indulge this assumption is to take an absolutist interpretation of one value protected in the First Amendment, the no-establishment principle, and to reduce the other value protected in the same text, the free exercise principle, to a nullity. It is just such an expansive reading of one clause as clashing with the other that this Court repudiated in *Walz v. Tax Commission*, 397 U.S. 664, 668-69 (1970). See also *Sherbert*, supra at 415-16 (Stewart, J., concurring) ("the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accomodation to individual belief"). To turn aside the free exercise claim presented by the petitioners on the basis of the conjecture or the worry that their praying together voluntarily might result in an impermissible establishment of religion merely demonstrates how far some courts have moved away from the balance struck in favor of free exercise values in *Sherbert* and *Yoder*.

It must be stressed that the petitioners are not infants, but mature students, currently of college age, and all juniors in high school at the time of the commencement of this action.[6] The Court of

[6]This case is not moot if only because the issue of damages remains to be determined if this Court should reverse the decision of the Court of Appeals.

Appeals attempted to distinguish the instant case from the contrary holding in *Chess v. Widmar*, ___ F.2d ___, (8th Cir. 1980), cert. granted sub nom. *Widmar v. Vincent*, No. 80-689, 49 U.S.L.W. 3617 (1981), and in *Keegan v. University of Delaware*, 349 A.2d 14 (Del. 1975), cert. denied, 424 U.S. 934 (1976), on the ground that college freshmen should enjoy significantly greater First Amendment protection than should a high school senior. 635 F.2d at 977. This view is flawed for several reasons. First, the majority of our citizens complete their formal education and training in high school. Second, the process of maturation is developmental and does not occur magically upon the awarding of a high school diploma or upon matriculation in a postsecondary institution. One of the reasons why churches in this country have engaged for centuries in an educational mission is to stress that religious studies form an integral part of a liberal education.[7] If, as amicus maintains, college students are to be encouraged to pursue such studies and to observe the practices connected with their voluntarily embraced religious commitments, this policy cannot be fostered by stifling the development of

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[7]See, e.g., J. Mosely, ed., *Church and College: A Vital Partnership* 4 vols. (1980); B. Fisher, ed. *New Pathways: A Dialogue in Christian Higher Education* (1980); J. Westerhoff, ed., *The Church's Ministry in Higher Education* (1978); R. Parsonage, ed., *Church Related Higher Education: Perceptions and Perspectives* (1978); E. Carlson, *The Future of Church-Related Higher Education* (1977); R. Baepler and A. Olsen, eds., *The Church-Related College in an Age of Pluralism: The Quest for a Viable Saga* (1977); National Commission on United Methodist Higher Education, *A College-Related Church: United Methodist Perspectives* (1976) and *Endangered Service: Independent Colleges, Public Policy and the First Amendment* (1976); and J. Newman, *The Idea of a University* (Image Book ed. 1959).

religious sensitivities among students immediately before they go to college. Hence, if a court tolls the bell for the right of voluntary religious expression on behalf of high school seniors, amicus perceives it as tolling as well for the same freedom that should be enjoyed by college freshmen. For this reason, amicus believes that the reliance by the Court of Appeals, 635 F.2d at 977, on cases involving kindergarten students, *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), cert. denied, 382 U.S. 957 (1965), is wholly misplaced. The student petitioners in the instant case are of sufficient maturity to register to vote, and, if it were necessary, to serve in the armed forces. It is a gross misunderstanding of the level of their maturity to treat them in a paternalistic fashion as though they were infants incapable of any intelligent, truly voluntary decision-making.

The Court of Appeals appears prepared to acknowledge at least implicitly a distinction between kindergarten children and upper level high school students. For in ruling on the free speech claims presented by the petitioners, it discussed the leading decision of this Court concerning the First Amendment rights of high school students, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1959). See 635 F.2d at 980. But the Court of Appeals misconstrued *Tinker* to be limited to *political* speech, asserting that "sensitive Establishment Clause considerations limit their right to air *religious* doctrines." 635 F.2d at 980 (emphasis supplied). *Tinker* may not be read in such a strained, wooden fashion, for although the wearing of a black armband by John Tinker and his companions in the context of a protest to this country's participation in the Vietnam conflict had clear overtones of political protest, the record in *Tinker* makes clear that the meaning of this act as

well as its motivation was explicitly religious.[8] Nothing in *Tinker* justifies the decision of the Court of Appeals that the government must allow on public school property sundry forms of political speech, but may ban from public property voluntary meetings of mature students for purposes of engaging in speech the content of which is religious. For "it seems doubtful that sacrificing religious freedom on the altar of anti-establishment would do justice to the hopes of the Framers — or to a coherent vision of religious autonomy in the affirmative state." L. Tribe, *American Constitutional Law* 834 (1978). By granting certiorari in this case, this Court could reaffirm its teaching concerning the primacy of free exercise values in cases of potential conflict with the no-establishment principle.[9] And

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[8]The father of John Tinker is a Methodist minister who was at the time of the act challenged in the lawsuit working for the American Friends Service Committee, an organization founded by Quakers to oppose war and to help solve social problems in a friendly spirit. A. Ginger, *The Law, the Supreme Court and the People's Rights* 200 (1973). The wearing of the armband, coupled with voluntary fasting on two days during the Advent and Christmas season, was a religious act of mourning for the war dead. Even if the acts engaged in by the students had not been so explicitly linked to a traditional religion, these acts were surely within the expansive definition of religion adopted by this Court in the draft cases arising in this period, *Welsh v. United States*, 398 U.S. 333 (1970), and *United States v. Seeger*, 380 U.S. 163, 187 (1965).

[9]See, e.g., *McDaniel v. Paty*, 435 U.S. 618, 619-641 (1978) (Brennan, J., concurring). And see Choper, "The Religion Clauses of the First Amendment: Reconciling the Conflict," 41 U. Pitt. L. Rev. 673 (1980); Fink, "The Establishment Clause According to the Supreme Court: The Mysterious Eclipse of Free Exercise Values," 27 Cath. U. L. Rev. 207 (1978); Pfeffer, "The Supremacy of Free Exercise," 61 Georgetown L.J. 1115 (1973); and Gianella, "Religious Liberty, Non-Establishment, and Doctrinal Development." 80 Harv. L. Rev. 1381, 1389 (1967).

this Court could likewise reassert that high school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker, supra*, at 506.

B. THE RELATIONSHIP BETWEEN THE RELIGION CLAUSES AND OTHER FREEDOMS PROTECTED BY THE FIRST AMENDMENT

Not only is the result reached by the circuit court not required by *Tinker;* it militates against the whole corpus of free speech doctrine elaborated by this Court, for the "government has no power to restrict expression because of its message, its idea, its subject matter, or its content. . . ." *Police Dept. of City of Chicago v. Mosely*, 408 U.S. 92, 95-96 (1972). See also *Poulos v. New Hampshire*, 345 U.S. 395 (1953); *Fowler v. Rhode Island*, 345 U.S. 67 (1953); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Kunz v. New York*, 334 U.S. 558 (1948), and *Tucker v. Texas*, 326 U.S. 517 (1946). As Justice Brennan has stated: "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel v. Paty*, 435 U.S. 618, 641 (Brennan, J., concurring). See also L. Tribe, *American Constitutional Law*, 1979 supp. at 78-79 ("government may not constitutionally use religion as a basis for burdensome classifications"). When, as here, a public school district makes its facilities available to a wide variety of groups wishing to use them for their meetings during off-school hours, A.15-18, but denies such access only to a voluntary association wishing to use the facility to engage in religious speech, the government has created a content-based restraint which unduly burdens the expression and communication of ideas. See L.

Tribe, *American Constitutional Law* 580-582 (1978).

The Court of Appeals did not address the claim of the petitioners that the action of the school board had denigrated their freedom of association. The desire to gather together into groups is a typically American practice. As Alexis de Tocqueville observed over a century ago:

> The most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow creatures and of acting in common with them.

A. de Tocqueville, I *Democracy in America* 196 (P. Bradley, ed. 1945).[10]

Although there are no decisions of this Court squarely holding that a voluntary association of students seeking to pray together is protected by freedom of association, it would not constitute a leap from from this Court's precedents to grant to mature students under the circumstances of the instant case the kind of constitutional protection afforded to civil rights groups, *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958), political parties, *Buckley v. Valeo*, 424 U.S. 1 (1976), labor organizations, *United Transportation Union v. Michigan*, 401 U.S. 576 (1971), banks and other for-profit corporations, *First National Bank of Boston*

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[10]See Raggi, "An Independent Right to Freedom of Association," 12 Harv Civ. Rts-Civ. Lib. L. Rev. 1 (1977). And see Gaffney, "The Constitution and the Campus: The Case for Institutional Integrity and the Need for Critical Self-Evaluation," in J. Mosely, ed. *3 Church and College: A Vital Partnership* 54-56, 60-62 (1980); Emerson, "Freedom of Association and Freedom of Expression," 74 Yale L.J. 1 (1974); Rice, "The Constitutional Right of Association" 16 Hastings L.J. 491 (1965); C. Rice, *Freedom of Association* (1962).

v. Bellotti, 435 U.S. 765 (1978), and religious bodies, *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952). To fail to extend to the student petitioners in the instant case the constitutional protection extended to the on-campus activities of Students for a Democratic Society, *Healy v. James*, 408 U.S. 169 (1972), or to students seeking official recognition of a gay rights organization, *Gay Lib v. University of Missouri*, 558 F.2d 848 (8th Cir. 1977), cert. denied, 434 U.S. 1080, reh. denied, 435 U.S. 981 (1978), would be doubly ironic in that Students for Voluntary Prayer at no time sought official recognition, approval, or support for their activities. The associational rights of the petitioners should be protected no less than those of other student groups organized for legitimate ends, *McDaniel v. Paty, supra* at 641 (Brennan, J., concurring); and among these rights should be equal access to public facilities on a neutral and nondiscriminatory basis.

By granting certiorari in this case, the Court could reassert its teaching that a state may not unduly burden the free speech rights and the associational rights of high school students merely because the content of their speech and the purpose of their voluntary association is religious in character.

III. GRANTING CERTIORARI IN THIS CASE WOULD ENABLE THIS COURT TO CLARIFY THAT THE HISTORIC PURPOSE OF THE FIRST AMENDMENT RELIGION CLAUSES WAS NOT TO STIFLE VOLUNTARY ASSOCIATION FOR THE PURPOSE OF ENGAGING IN RELIGIOUS ACTIVITIES, BUT TO KEEP THE GOVERNMENT FROM IMPOSING ANY

SECTARIAN OR DENOMINATIONAL VIEWPOINT OR PRACTICE INVOLUNTARILY UPON THE PEOPLE.

Whether this Court should engage in the writing of legal history in its opinions is itself a debatable matter.[11] Justice Brennan, for example, has expressed the view that "an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems." *Schempp*, 374 U.S. at 234 (Brennan, J., concurring). That this view does not preclude the writing of legal history by this Court follows from its occurence after one of Justice Brennan's own attempts to account for the history underlying the Religion Clauses. To adopt the view as a standard would imply one of two courses. Judges reviewing Establishment Clause matters should either be aware of the complexity of the historical aims of the Founding Fathers or they might prefer to resolve a case not by reference to history but by an analysis of the "concrete problems" before them. But it is plainly insufficient to invoke the past vaguely or erroneously as the rationale for an inadequate resolution of a concrete problem. The opinion of the Court of Appeals adopts the oversimplified view that there were simply three different reasons for erecting a high and impregnable wall of separation of church and state. A more serious attempt to account for the history underlying the Religion Clauses than that produced by the Court of Appeals would, in fact, undergird a conclusion opposite from that reached by the Court of Appeals. Its simplistic version of the past should not be allowed to stand as a rationale for excluding religionists from the protection of freedom of speech and association or

[11] See, e.g., C. Miller, *The Supreme Court and the Uses of History* (1969), and literature cited therein.

for denigrating a free exercise claim because of a highly dubious conjecture that accommodation of that interest would impermissibly establish a religion.

The members of the First Congress who spoke about the First Amendment were of one mind that reasonable accommodation of religious beliefs and practices was not only constitutionally permissible, but also desirable as a matter of public policy. The general thrust of the framers' intention is ably stated in a recent historical study by Michael Malbin:

> All of the speakers [on the First Amendment in the first Congress] . . . agreed that the Bill of Rights should prohibit the new government from establishing a national religion. . . . What should be emphasized here is the broad area of agreement between Madison and the others in the First Congress. They all wanted religion to flourish, but they all wanted a secular government. They all thought a multiplicity of sects would help prevent domination by any one sect.

M. Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* 9, 15 (1978). In particular, the discriminatory denial of the use of public facilities to voluntary associations who gather for a religious purpose cannot be justified by a vague reference to James Madison, for the views of the floor manager of the First Amendment were not those espoused by the Court of Appeals. For example, the first text that Madison proposed to the Congress read as follows: "The Civil Rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be

established, nor shall the full and equal rights of conscience be in any manner, nor on any pretext infringed." 1 *Annals of Congress* 434 (June 8, 1789). It was Madison, moreover, who endorsed the method of examining the "practices of the times" in order to ascertain the meaning of the Establishment Clause. Letter of Madison to M. L. Hurlbert, May, 1830, in G. Hunt, ed. IX *Writing of James Madison* 370-375 (1909). Employing this criterion, one can safely conclude that history is on the side of the petitioners. For the members of the First Congress, including Madison, appropriated funds for the construction of facilities in federal territories that were explicitly to include religious instruction among their legitimate purposes. See C. Antieau, A. Downey, and E. Roberts, *Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses* (1964).

Madison also suggested that the meaning of the Establishment Clause is to be ascertained from considering the "true sense in which it was adopted by the states." This sense is reflected, for example, in the platform of Jefferson's Democratic-Republican Party in 1800, which asserted its support of "freedom of religion, and opposition to all maneuvers to bring about legal ascendancy of one sect over another." W. Blakely, ed., *American State Papers Bearing on Sunday Legislation* 166 (1911). Consistent with this interpretation of the evil that the First Amendment was intended to correct, Justice Story wrote: "The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." J. Story, III *Commentaries on the Constitution of the United States* 166 (1833). In

this view, the Religion Clauses were designed to prohibit exclusive or preferential privileges for any one sect or religious group. "A policy of withdrawing the power of the Federal Government to aid religion was not contemplated and would have found emphatic disapproval. It was, in short, a policy of 'non-establishment' or equality in law for all religious groups." C. Antieau, A. Downey, and E. Roberts, *Freedom From Federal Establishment* 160 (1964). If legal history is to be employed in the resolution of Establishment Clause cases such as the case at bar, those who do so should be more aware of the complexity of that history than is manifest in the version of history adopted by the Court of Appeals.

By granting certiorari in this case, the Court could clarify that the historic purpose of the Religion Clauses was not to stifle voluntary association for the purpose of engaging in religious activities, but to keep the government from imposing any sectarian or denominational viewpoint or practice involuntarily upon the people.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue in this case, and this Court should reverse the judgment of the Court of Appeals.

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CERTIFICATE OF SERVICE

State of Indiana)
) ss.:
St. Joseph County)

On this _____ day of March, 1981, before me, a Notary Public for the State of Indiana and St. Joseph County, the undersigned, Edward McGlynn Gaffney, Jr., personally appeared and, being duly sworn according to law, did depose and say that he mailed today, by First-Class postage pre-paid mail, three copies of the Brief of the Center for Constitutional Studies of the University of Notre Dame Law School as Amicus Curiae in Support of the Granting of Certiorari to the following attorneys:

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Sworn to and Subscribed before me
the day and year aforesaid.

Rosemary K. Reiter, Notary Public